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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 615

STEWART DIE CASTING CORPORATION,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

As appears from the petition filed herein by Petitioner, three questions are presented for decision. We shall deal with these matters in order.

1. As stated in the petition, the Decision and Order of Respondent made herein extends the right to reinstatement and back pay to those employees of Petitioner who engaged in the sit-down strike at its plant on March 16, 1937. This was done because, as stated by Respondent (R. 1638), the sit-down strike was devoid of violence, the strikers evacuated the plant promptly when the police entered, the sit-down strikers were not discharged, and when Petitioner's plant was reopened, there was no discrimination against the sit-down strikers in giving reemployment.

The Court of Appeals sustained this conclusion of Respondent (R. 1697, 1698, 1713-1715) on the grounds that the sit-down strikers were not discharged, although they might have been, and that since they were not discharged, the decision of this Court in *Labor Board* v. *Fansteel etc. Corp.*, 306 U. S. 240, was not controlling; that they were reinstated without discrimination because of their participation in the sit-down strike; and that with the exception of 12 or 14 persons who admitted their participation in the strike, the identity of the sit-down strikers did not appear, the burden of proving their identity resting upon Petitioner.

The facts are correctly stated in the Decision and Order of Respondent and the Opinion of the Court of Appeals, but we submit that these facts do not support the conclusions reached. In the *Fansteel Corporation* case, 306 U. S. 240, those who actually participated in the sit-down strike were discharged, but this Court did not hold that to be the essential fact in determining their right to reinstatement. The holding made (p. 258) was that the reinstatement of the sit-down strikers would not effectuate any purpose of the Act. As stated by this Court (p. 259) the respondent there "stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them."

That also was the ground upon which this Court refused the right of reinstatement to 14 persons who did not participate in the sit-down strike and who were not discharged (p. 259) but who aided and abetted the sit-down strike. This Court held (p. 261) that notwithstanding the failure to discharge them, the aiders and abetters were in no better case than the sit-down strikers, and that there was no policy of the Act justifying the Board in requiring their reinstatement.

This Court's decision was followed and applied in *McNeely etc. Co.* v. *Labor Board*, 106 Fed. (2) 878 (3rd

Cir.). In that case, it appeared that the sit-down strikers were not discharged (p. 879) and that they did not resist a court injunction to vacate (p. 880). For these reasons, the Board argued that the decision of this Court in the *Fansteel Corporation* case, 306 U. S. 240, was not controlling. The court, however, held that under the decisions of this Court, such a discharge was not necessary, concluding (p. 880) that the reinstatement of the sit-down strikers could not be required by the Board since it could not effectuate any purpose of the Act.

The reinstatement of some sit-down strikers without discrimination was also held by this Court in the *Fansteel Corporation* case, 306 U. S. 240, to confer no rights upon such strikers. In that case, some of the sit-down strikers were reemployed without discrimination, subsequent to the sit-down strike, but this Court held (p. 259) that such action did not alter the Company's rights, and that in reemploying some of the sit-down strikers, it was only exercising its normal right to select its employees.

Thus, on these matters the decision of the Court of Appeals herein seems to be in direct conflict with the decisions in the *Fansteel Corporation* case and the *McNeely* case. It is difficult to understand its action, since it made the decision on these matters (98 Fed. (2) 375) which was sustained by this Court in the *Fansteel Corporation* case.

The Court of Appeals also upheld the awards to the sit-down strikers because all of them were not identified in the evidence. It held (R. 1698) that the burden of showing their identity rested upon Petitioner as a matter of defense, and that all of Petitioner's employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights. We submit that this conclusion is not supported by law or reason.

In this case Respondent was the real complainant. In

its complaint and in the evidence which it offered, it asserted rights which it claimed were vested in the persons named in the charge and complaint, and charged Petitioner with divers violations of law to the prejudice of those rights. It certainly had the burden of proving the existence of the asserted rights, and the commission by Petitioner of the asserted law violations which prejudiced those rights. It was under obligation to produce evidence sufficient to "justify, if the trial were to a jury, a refusal to direct a verdict." *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 300.

As part of its case, Respondent proved the fact of the sit-down strike. Under the law as it was then and is now, those who participated in that strike thereby lost their rights as employees, and consequently were not entitled to reinstatement or back pay. These things being so, it would seem clear that if there was a burden of proof, the burden was upon Respondent to prove that those for whom it sought a recovery were not barred from such a recovery through the loss of their status as employees by participation in the sit-down strike. Such burden has been held to rest upon Respondent. *Labor Board* v. *Carlisle Lbr. Co.*, 99 Fed. (2) 533, 537, 538. Had the trial been to a jury, the lack of such proof would have required a directed verdict for Petitioner.

It is significant that in its Decision and Order, Respondent did not assert Petitioner's failure to identify the sit-down strikers as a justification for its inclusion of those strikers among those entitled to benefits. So far as concerns this circumstance, the facts in this case are substantially the same as in the *Fansteel* case. The Court of Appeals' opinion in that case (98 Fed. (2) 375) states (p. 377) that originally about 100 unknown persons occupied the Company's plant; and indicates that of this number only 66 were subsequently identified (p. 378). The

condemnation of the sit-down strikers nevertheless ran against all of them, whether known or unknown.

Nor would the elimination of the sit-down strikers from those entitled to the benefits of Respondent's Decision and Order deprive any employee who did not participate in that strike of any of his rights. If reinstatement and back pay were confined to those persons who did not engage in the sit-down strike, those entitled to those benefits could secure them upon a showing that they did not thus engage. Nor would any improper burden thus be cast upon them or Respondent. A recovery is sought in their behalf, and it is only fair that proof of their right to that recovery be supplied.

In any case, there were at least 11 persons who testified affirmatively that they did participate in the sit-down strike (R. 157, 211, 256, 286, 302, 422, 484, 526, 611, 655, 917). Under the decision of this Court in the *Fansteel Corporation* case, *supra*, these persons, at least, are not entitled to reinstatement and back pay.

2. As stated in the petition filed herein, Appendix B to Respondent's Decision and Order (R. 1661) lists 41 individuals who went on strike, presumably on March 16, 1937 or thereafter, were subsequently reinstated by Petitioner, and thereafter discharged, the dates of reinstatement and subsequent discharge being shown in Appendix B. The Decision and Order awards to each of these persons the right to back pay from June 24, 1937 up to the date of his reinstatement, and also the right to a second reinstatement and to back pay from the date of his discharge to the date upon which reinstatement is again offered or he is placed upon a preferential list. The Court of Appeals sustained this requirement (R. 1700, 1713, 1714), apparently upon the theory that the discharge of these persons upon the dates shown in Appendix B (R. 1661, 1716, 1717) was an unfair labor practice occurring after

the filing of the complaint, and of which Respondent could take cognizance.

The fact is that with the exception of Fisher and Zukowski, all of the persons listed in Appendix B and who had been re-employed after the strike ended, had again been discharged before the issuance of the complaint herein (R. 36) and before the filing of the charge upon which that complaint was based (R. 38). Fisher is not mentioned anywhere in the pleadings. Chocin, Kranz and Schupolsky were not listed in the original charge, but were added by amendment (R. 45). All the rest were listed in the original charge (R. 38-40). Thus, if the discharges were violations of law, in all but two instances the violations had occurred prior to the filing of the charge and issuance of the complaint. Decisions which give Respondent authority to deal with an unfair labor practice occurring subsequent to the filing of the charge but growing out of matters dealt with therein, have no application to the point which we now make. See *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 369.

Our point is that since the second amended charge upon which the complaint herein was based did not allege that the discharge of these individuals by Petitioner, subsequent to their re-employment, was a violation of law, or that by reason of such discharges, Petitioner was under any obligations to those persons by way of reinstatement and back pay, Respondent had no authority or jurisdiction to include such allegations in the complaint and proceed to judgment upon them. Moreover, we contend that Respondent had no jurisdiction to amend the charge by adding Chocin, Kranz and Schupolsky to the list attached to the charge, nor to make an order in favor of Fisher, who was not listed in the charge or complaint, even as those documents were amended.

Section 10 of the Act prescribes the methods by which Respondent may prevent unfair labor practices and com-

pensate persons injured by such practices. In Section 10(a) Respondent is empowered to act "as hereinafter provided." In Section 10(b) Respondent is authorized to issue a complaint "whenever it is charged" that any person has violated the Act. The same section provides that such a complaint shall state "the charges in that respect."

This language confers no authority upon Respondent to originate a charge, to amend a charge after it has been filed, to issue a complaint in the absence of a charge, or to issue a complaint containing allegations of law violation arising out of a status existing when the charge was filed, if the charge upon which the complaint is based does not contain such allegations. In *Labor Board* v. *Hopwood Retinning Co.*, 98 Fed. (2) 97 (2nd Circ.) it was held (p. 101) that under the Act, the filing of a charge is a required preliminary to the issuance of a complaint and to the attaching of the jurisdiction of Respondent; that the complaint and hearing must be in accord with the charge in an attempt to prove or rebut such charges, and that Respondent cannot use its own initiative in respect to charging unfair practices.

In *Labor Board* v. *National Licorice Co.*, 104 Fed. (2) 655, the same Court of Appeals said (p. 658) that in the *Hopwood* case, *supra*, it had held that a charge is a condition precedent to Respondent's power to issue a complaint. In *Consumers Power Co.* v. *Labor Board*, 113 Fed. (2) 38 (6th Circ.) it was also held (p. 42) that no charge may be issued by Respondent until a charge has been filed with it, the Court saying that the filing of a charge is jurisdictional. The *National Licorice Company* case came to this Court and was decided at 309 U. S. 350. This Court mentioned this point without deciding it, saying at p. 369:

> "It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it."

Thus, the decision of the Court of Appeals on this point in the case at bar is not only based upon an erroneous assumption of fact, but in practice, is in conflict with decisions of the Courts of Appeal for the Second and Sixth Circuits upon the same point, which has not yet but should be decided by this Court. We submit that the decisions in the *Hopwood Company* case and *National Licorice Company* case are supported by reason.

Certainly, the Act requires a charge as a condition precedent to the issuance of a complaint, and this being so, it follows that Respondent has no authority to amend a filed charge. Therefore, it is only logical that a complaint must be limited, so far as conditions then existing are concerned, to matters set up in the charge. If this is not so, Respondent would have the right to initiate a complaint on a charge made by it, on the basis of facts existing when a charge is filed, without having a charge as a basis therefor, thus nullifying the express requirement of the Act that a charge be filed as a condition precedent to the issuance of a complaint.

3. As stated in the petition filed herein, the Decision and Order of Respondent awards a right to reinstatement and, under stated conditions, back pay to all employees of Petitioner who were on strike on March 23, 1937 and who have not been reinstated (R. 1657, 1658). This award runs in favor of persons who are not identified in the record by name or otherwise, who did not testify and concerning whom, as individuals there is no evidence whatsoever in the record. The Court of Appeals sustained this requirement, apparently upon the assumption that our only objections to it were that the required reinstatement and back pay were not issues tendered by the charge and the complaint, and that the beneficiaries of the requirement had ceased to be employees of Petitioner (R. 1699, 1715).

But these were not our only objections to the requirement. We do not now take the position that all persons

on strike on March 23, 1937 were not employees of Petitioner. We do maintain that if these unidentified persons were to be granted rights, the charge filed with Respondent should have named them and contained charges on their behalf; and that the complaint issued by Respondent should have identified them and contained allegations in their behalf. We also maintain that the record should contain some evidence sustaining an award to them; and that since none of these things are so, the requirement is beyond the authority of Respondent.

In this case, both the complaint and the charge upon which it was based dealt only with the parties named therein. In the charge, only those persons listed in Exhibit A (R. 38-40, 45) are alleged to have been refused reinstatement and back pay (R. 37). The complaint only alleges that the persons named in paragraphs 9, 10 and 11 thereof (R. 31-34) were denied reinstatement. Neither document alleges such violations of law with respect to persons other than those named. Upon the theory that the issues, so far as they related to individuals, were confined to the persons so named, objections were sustained to evidence offered by Petitioner in the proceedings before Respondent, and which was pertinent if the proceeding involved all strikers. The sole reason for sustaining the objections was that the evidence related to parties not named in the complaint and who did not testify (R. 1199, 1201, 1221, 1223).

Moreover, the motion of Petitioner to dismiss the proceeding as to individuals named in the complaint but who did not testify (R. 1254) was sustained (R. 1255, 1256). All these rulings of the Examiner were sustained by Respondent (R. 1639), which also dismissed the proceeding as to persons named in the complaint but who did not testify (R. 1658, 1659). These actions of respondent were a practical application of the theory which we now advance

in connection with the awards to all unnamed persons who were on strike on March 23, 1937.

As we have argued, Respondent only acquires jurisdiction to issue a complaint when a charge is filed with it, and cannot issue a complaint with respect to a status existing when the charge is filed but not complained of therein. *Labor Board* v. *Hopwood, etc., Co.*, 98 Fed. (2) 97, 101; *Labor Board* v. *National Licorice Co.*, 104 Fed. (2) 655, 658; *Consumers Power Co.* v. *Labor Board*, 113 Fed. (2) 38, 42.

We also submit that Respondent cannot award reinstatement and back pay to persons not named in a complaint. It is true that in *Republic Steel Corp.* v. *Labor Board*, 107 Fed. (2) 472 (3rd Circ.), the Court held that reinstatement could be required, even though the issue was not tendered in the complaint (p. 478). But it does not appear from that decision that the complaint did not name those whose reinstatement was required, and we submit that in any case, the decision is not correct on this point. In *Globe Cotton Mills* v. *Labor Board*, 103 Fed. (2) 91 (5th Circ.), the Court set aside a requirement of Respondent on the ground that the complaint contained no charge on which the requirement could be based, holding (p. 93) that Respondent may not issue an order touching a matter not complained of. We submit that this is the correct rule and is supported by every consideration of fairness and justice.

It would seem plain that Petitioner was entitled to know to whom it might be required to grant reinstatement and, under stated conditions, back pay. It would seem that it should have been advised by the charge and complaint of the identity of those having claims and of the character of those claims. But it has not been so advised by the charge, the complaint, the evidence, or the order. There is even considerable doubt that the identity of those employees

who were on strike on March 23, 1937, could be proven, for Petitioner's plant was then closed and did not reopen until March 25 (R. 957) when all employees were told that those who returned before April 5, 1937, would be paid for the time the plant was closed (R. 972, 1006, 1007, 1029). This general requirement has been contained in orders of Respondent which have been sustained, but in no such case was the requirement specifically contested.

The impropriety of the procedure which has been followed has deprived Petitioner of a substantial right. Respondent has no authority under the Act to require the reinstatement of those strikers who have obtained substantially equivalent employment elsewhere. *Mooresville, etc., Mills* v. *Labor Board,* 94 Fed. (2) 61, 66 (4th Circ.), 97 Fed. (2) 959, 961; *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537, 538 (9th Circ.); *Phelps Dodge Corp.* v. *Labor Board,* 113 Fed. (2) 202, 205 (2nd Circ.). And since such persons were not entitled to reinstatement, they were not entitled to back pay. *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537 (9th Circ.); *Labor Board* v. *Hearst,* 102 Fed. (2) 658, 664 (9th Circ.). There is no proof in the record that these unnamed strikers had not, at the time of the hearings herein, secured substantially equivalent employment elsewhere, although the burden of proving their status as employees and their consequent right to reinstatement and back pay rested upon Respondent. *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537. Had Petitioner known that Respondent intended to grant benefits to persons other than those named in the charge, in the complaint and in the evidence, it might have been able to prove that such persons were not entitled either to reinstatement or back pay because they had secured such substantially equivalent employment elsewhere.

As we have said the Decision and Order of Respondent actually applies the principles for which we contend. Objections to evidence offered by Petitioner were sustained

on the sole ground that it did not relate to persons named in the complaint. The complaint was dismissed as to 25 persons named therein for the sole reason that no evidence was presented in their behalf, and Bror Johnson, a named complainant (R. 39, 32) was refused the benefits of the Decision and Order because he had another job which paid him more money (R. 1642). Thus 25 persons named in the charge and complaint were denied the benefits of the Decision and Order because they did not prove through testimony their right to a recovery; while an unknown number of unnamed persons who also did not prove their right to a recovery, are granted the benefits of the Decision and Order. There is very little logic in such a result. And if the 25 persons as to whom the complaint was dismissed are nevertheless entitled to reinstatement under this requirement, the inconsistency of what has been done is still greater.

Conclusion.

From the foregoing it will be seen that with respect to the three questions here presented, the Court of Appeals in the case at bar has apparently departed from rules of law laid down by this Court, has certainly differed from decisions of other Courts of Appeal on similar matters, and with respect to the required reinstatement of all persons on strike on March 23, 1937, has certainly sanctioned a departure by Respondent from the usual course of judicial proceedings.

For all of these reasons, we submit that the writ of certiorari prayed for should be granted.

Respectfully submitted,

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